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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 731

FRANCES E. CARLIN, as administratrix of George Waterson, Sr., deceased,

Petitioner,

against

SAVERIO D. IOVINO and LEONARD P. LUISI,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Frances E. Carlin, as administratrix of George Waterson, Sr., deceased, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit affirming an order of the District Court, Southern District of New York, to substitute the said Frances E. Carlin, as administratrix aforesaid, in place and stead of George Waterson, Sr., deceased, as party defendant in an action pending in said court.

Opinions Below

The opinion of the District Court is not officially reported and is printed in the Appendix (p. 1a). The opinion of the Court of Appeals is also printed in the Appendix (p. 8a) and not yet officially reported.

Jurisdiction

The basis of Federal jurisdiction is diversity of citizenship as the ground for removal of the cause from the Supreme Court of the State of New York.

The appeal was taken on the certificate of the District Court (Appendix p. 5a) and pursuant to leave of the Court of Appeals (Appendix p. 7a) as provided in 28 U.S.C. § 1292(b). The decision of the Court of Appeals was dated and filed in the Office of the Clerk for the Second Circuit on December 1, 1959.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the decision in *Anderson* v. *Yungkau*, 329 U. S. 482, holding F. R. Civ. Proc. 25(a) to be "a statute of limitations upon revivor" and "a mandate to the court to dismiss an action not revived within the two-year period", has lost its controlling force since the Revision Act of 1948 repealed former 28 U.S.C. § 778, as to which a conflict now appears to exist between the Fifth Circuit in *Perry* v. *Allen*, 239 F. 2d 107, and the Second Circuit in the case at bar.

2. Whether the Court of Appeals erred by invoking the principle of estoppel to avoid the bar of F. R. Civ. Proc. 25(a) against revival of the action under the circumstances of this case.

3: Whether the Court of Appeals erred in giving precedence to F. R. Civ. Proc. 25(a) over the doctrine announced in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, and applied to conflicts of laws in *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, so as to allow revival and substitution of a foreign personal representative as party defendant in a diversity suit, even though the law of the State in which the District Court sits—here New York—prohibits it.

Rule Involved

This case concerns the application of F. R. Civ. Proc. 25(a), which provides, in material part, as follows:

"Rule 25. Substitution of Parties.

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district."

Statement of the Case

The respondents as plaintiffs sued to recover damages for personal injuries sustained on December 24, 1954, in the State of Virginia, while riding as passengers in an automobile owned by the late George Waterson, Sr. (original defendant) and operated by his son at the time of the accident, and who was himself killed in the occurrence.

The action was commenced on March 5, 1955, in the Supreme Court of the State of New York, County of New

York, by service of a summons (without a complaint). It was thereafter removed to the District Court by the defendant on March 25, 1955, on the ground of diversity of citizenship. The plaintiffs in the case are residents of the State of New York, and the defendant resided in Camden, New Jersey.

On April 24, 1955, the defendant (George Waterson, Sr.) died intestate in the State of New Jersey. He left no property or estate in the State of New York or in the Southern District of New York, where it is sought to revive and continue the action against the decedent's estate.

Subsequent to death, various proceedings were had in the action by service of an unverified complaint on the original defendant's attorney of record, which was followed by service of an unverified answer on his behalf, and in conducting examination of the plaintiffs before trial, and in pre-trial conferences before the District Court. The attorneys on both sides of the case were acting without knowledge or awareness of the defendant's demise.

On July 9, 1958, pursuant to an order of the Camden County Court, Probate Division, State of New Jersey, the petitioner (Frances E. Carlin) was appointed administratrix *ad litem* of the estate of George Waterson, Sr., deceased (being the same person as the named defendant in the action).

On August 6, 1958, more than three years after the defendant's death, the plaintiffs moved to substitute the said Frances E. Carlin, as his administratrix aforesaid, as party defendant in the action and for leave to serve an amended complaint.

The said administratrix appeared specially in opposition to the motion for substitution, which, however, was granted by order of the District Court lately affirmed by the Court of Appeals in this case.

Reasons for Granting the Writ

The considerations that justify the grant of certiorari here may be summarized as follows:

1. The existence of a conflict between the Second and Fifth Circuits as to F. R. Civ. Proc. 25(a).
2. The misapplication of estoppel in avoidance of F. R. Civ. Proc. 25(a).
3. The erroneous modification of the *Erie-Tompkins* doctrine by giving precedence to F. R. Civ. Proc. 25(a) over the law of New York as declared by its highest court.

POINT I

The case involves an important Rule of Civil Procedure for the federal courts as to which the Circuits are in conflict regarding its application.

The motion for substitution of the defendant's administratrix in his place and stead as party defendant in this action came too late. More than two years had elapsed since the defendant's death on April 24, 1955. The action may not now be revived against his estate, but must be dismissed under F. R. Civ. Proc. 25(a).

The rule leaves no discretion or power of choice in the court. It operates as a statute of limitations against substitution of the defendant's administratrix and revival of this action, and mandates dismissal of the cause. Thus, under similar circumstances in *Anderson* v. *Yungkau*, 329 U. S. 482, the Supreme Court affirmed the denial of motions to revive actions against deceased defendants and substitute their legal representatives more than two years after death of the original parties. The action was dismissed under F. R. Civ. Proc. 25(a), even though the plaintiff's failure to act within the period of limitations was the result of "excusable neglect." (See 1 F.R.D. 589; 153 F.

2d 685.) Said the Supreme Court (pp. 483-484, 485-486 of 329 U. S.):

"* * * The case is here on a petition for a writ of certiorari which we granted because the case presented an important problem in the construction of the Rules of Civil Procedure.

"The case involves a reconciliation of Rule 25(a) and Rule 6(b).

* * * * *

"* * * In contrast to the discretion of the court to order substitution within the two-year period is the provision of Rule 25(a) that if substitution is not made within that time the action 'shall be dismissed' as to the deceased. The word 'shall' is ordinarily 'the language of command.' *Escoe* v. *Zerbst*, 295 U. S. 490, 493. And when the same Rule uses both 'may' and 'shall', the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory. See *United States* v. *Thoman*, 156 U. S. 353, 360.

"Thus, as stated by the Circuit Court of Appeals, Rule 25(a) operates both as a statute of limitations upon revivor and as a mandate to the court to dismiss an action not revived within the two-year period. Rule 6(b) relates to acts required or allowed to be done by parties to an action and permits the court to afford relief to a party for his failure to act within the prescribed time limits. There would be more force in petitioner's argument if Rule 25(a) had, without more, set a two-year period within which substitution might be made. But Rule 25(a) does not stop there. It directs the court to dismiss the action if substitution has not been made within that time. That is action required of the court, not of a party. And Rule 6(b) should not be construed to override an express direction of action to be taken by the court. See *Wallace* v. *United States*, 142 F. 2d 240, 244."

In the case at bar, however, the District Court stated (Appendix p. 2a):

"There is little doubt that up to 1948, the *Anderson* case (*supra*) controlled situations such as the one before us now. After the Revision Act of 1948 repealed 28 U.S.C. 778, the case of *Anderson* v. *Yungkau* (*supra*), which was based upon this statute, lost its controlling force.

"Before we can intelligently discuss the scope of Rule 25 we must study 28 U.S.C. 2072 Rules of Civil Procedure for district courts. * * *.

* * * * *

"It can thus be seen that the Rules cannot deprive a party of a substantive right. For this reason we cannot accept the interpretation of this Rule proposed by the Administratrix for to do so would render Rule 25 invalid.

"We believe that this was firmly established by *Perry* v. *Allen*, 239 F. 2d 107 (C.C.A. 5th) at page 112, Circuit Judge Cameron states:

> "'Under these tests, we hold that Rule 25(a)(1) is not a Statute of Limitations and is invalid insofar as it attempts to abridge appellant's substantive right to bring his civil action to trial on its merits, by placing a categorical and inflexible time limit upon his right to substitute the collector's administrator. Such an attempt is outside the mandate and inside the caveat of the Act of Congress.'"

While the Court of Appeals affirmed the order of the District Court in this case, it rejected the rationale of decision and took occasion to express disagreement with the *Perry* view. Thus, Judge Friendly said (Appendix p. 23a):

"(1) For reasons indicated above, we are not inclined to give significance to the repeal of 28 U.S.C.

§ 778 by the Revision Act. Moreover, with all respect to the judges of the Fifth Circuit, we find no sufficient reason for a view that although the substitution of the personal representative of a decedent is a matter of procedure within the Enabling Act, the placing of a time limit upon this is not." • • •

The conflict between the Second and Fifth Circuits is readily apparent, therefore, as to the effect of the Revision Act of 1948 on the continued validity of F. R. Civ. Proc. 25(a) as a statute of limitations on revivor binding the court and mandating dismissal of the action for failure to make substitution within the two-year period following the defendant's death.

POINT II

The principle of estoppel is not available in the circumstances of this case to avoid the bar of F. R. Civ. Proc. 25(a) against revival of the action.

The Court of Appeals fell back on the doctrine of estoppel to prevent the petitioner from claiming untimeliness in the plaintiffs' application for revival and her substitution as party defendant in the action. The basis for estoppel relates to various proceedings subsequent to death of George Waterson, Sr. by service of an unverified complaint on his attorney of record, which was followed by an unverified answer on his behalf, in conducting examination of the plaintiffs before trial, and also participation in pre-trial conferences.

These proceedings—taken in ignorance of his death—were legally futile, meaningless and nullities in the absence of a defendant in the case. When George Waterson, Sr. died, he was no longer a party to the action. The same event severed the attorney-client relationship previously existing between him and his attorney, who at the time of

service of papers and other proceedings as aforesaid was a complete stranger to the lawsuit. (See *Picking* v. *Pennsylvania R. Co.*, 11 F.R.D. 71, 75, app. dism. 3 Cir., 201 F. 2d 672, cert. den. 345 U. S. 1000, reh. den. 346 U. S. 843; *Chorney* v. *Callahan*, 135 F. Supp. 35; *Bradley* v *Halliburton Oil Well Cementing Co.*, 100 F. Supp. 983; *Hart* v. *Blabey*, 286 N. Y. 75; *Cosgrove* v. *Weierman*, 3 App. Div. 2d [N. Y.] 940; *O'Brien* v. *Flynn*, 238 App. Div. [N. Y.] 704; *Chandler* v. *Dunlop*, 311 Mass. 1.)

The rule of estoppel was misapplied in the circumstances of this case. This principle can be invoked *only against a party* to an action based on his own acts or conduct, for which he may in some way be personally responsible. The defendant was dead, as stated, and his attorney represented nobody, in fact, when the aforesaid acts were done. You can't blame a dead man for things done by a stranger in his name after his decease. George Waterson, Sr. did nothing after his death giving rise to estoppel against invocation of F. R. Civ. Proc. 25(a) to bar revival of the action against his estate.

Nor may estoppel be used against the petitioner as administratrix of the decedent's estate. She was not a party here until the District Court made its order of substitution in December, 1958. She is certainly not estopped by events in the action prior to her appointment in July, 1958, already more than two years subsequent to the defendant's death. The proceedings by way of service of complaint, answer, etc., were had and concluded long before an administratrix was appointed in New Jersey. They were not conducted on her behalf at all, so that she also is in no way responsible or bound by them (*Cosgrove* v. *Weierman*, 3 App. Div. 2d [N. Y.] 940; *Chandler* v. *Dunlop*, 311 Mass. 1). In short, Francis Carlin, as administratrix, did nothing before or since her appointment giving rise to estoppel against invocation of the period of limitations embodied in F.R. Civ. Proc. 25(a).

The Court of Appeals recognized, as it says (Appendix, p. 24a), "weighty indications that no consideration can ever be given to estoppel where there has been failure to comply with the two-year limitation of F. R. Civ. Proc. 25(a)." These indications were found to exist in the *Anderson* decision and the persistent refusal of the Supreme Court to heed recommendations for amendment of the rule. More importantly, there was also *Snyder* v. *Buck*, 340 U. S. 15, 19, holding that a declared policy of the law cannot be altered by some theory of estoppel. These indications would have been followed—albeit reluctantly—except for what the court conceived to be authority to the contrary in *Bush* v. *Remington Rand, Inc.*, 2 Cir., 213 F. 2d 456, cert. den. 348 U. S. 861, and *Glus* v. *Brooklyn Eastern District Terminal*, 359 U. S. 231. These authorities, as will appear, are clearly distinguishable and plainly inapplicable to the facts in the case at bar.

Thus, in the *Bush* case the defendant moved on January 31, 1950, to dismiss the action under F. R. Civ. Proc. 25(a) as to one of the plaintiffs (Mrs. Dysart) who had died in 1945 during the pendency of the suit, and whose legal representatives had not been substituted within the two years specified in the rule. The Court of Appeals affirmed a denial of the defendant's motion because, as it said (pp. 463-464 of 213 F. 2d), the defendant knew of the plaintiff's death as early as 1946 and stood by for more than four years without raising the issue of substitution until the conclusion of hearings on the merits before a Special Master in July, 1949; the plaintiffs meanwhile having expended time and effort in bringing the case to judgment. The court held that the rule was, in effect, a statute of limitations, and that a statute of limitations can be waived *by a party*. The living defendant by his own conduct was deemed to have waived the bar of limitations governing substitution as provided in the rule.

In the *Glus* case, also, it was an existing and active defendant held to estoppel because of its own conduct

enticing the plaintiff to delay until the statute of limitations had run on the cause of action. The familiar principle was invoked that "no man may take advantage of his own wrong." Was it wrong for George Waterson, Sr. to die? Is he responsible for anything that happened in this case during the weeks and months following death? Or is the petitioner—not yet in existence as representative of his estate—to be held to answer for him on account of acts or proceedings in the action not under the control of either of them?

In reaching for estoppel here the Court of Appeals was obliged to reject and, indeed, refused to follow as applied to the attorney-client relationship the "general rule that an agent's authority is revoked by the principal's death" (Appendix, page 26a). It has declared on its own a new principle in the law of agency—without authority to support it—that an attorney must keep himself informed of the continued existence of his client before taking affirmative steps in an action on penalty of binding the client's estate. This is not the law. As was said in *Matter of Levine's Estate*, 247 App. Div. [N. Y.] 19, 22:

> "It is undoubtedly the law that the authority of an attorney to act for his client ceases upon the death of the client (*Austin* v. *Monroe*, 4 Lans. 67, affirmed 47 N. Y. 360; *Matter of Dunn*, 205 N. Y. 398, 403, 98 N. E. 914, Ann. Cas. 1913 E. 536), and the agency is terminated even though no notice of the death be given to the attorney (Mechem, the Law of Agency, vol. 2, sec. 2316, p. 1904)."

No other court has ever gone so far as the Court of Appeals in this case in laying down a rule for the attorney-client relationship nowhere else to be found in the whole law of agency. At any rate, Professor Mechem tells us (2 Mechem, Agency, § 2316, page 1904)—quite pertinently—that:

"* * * there are certain events which may terminate the agency of which no notice need be given, since every one is bound to take cognizance of them. Death * * * require[s] no notice.

"Proceedings in the action which operate to terminate the [attorney's] authority must be notice to the parties to the action, at least * * *."

To sustain its position the Court of Appeals relied on *Hoopes' Estate*, 185 Pa. 167, and *Stewart's Estate*, 358 Pa. 434, while recognizing—as well it might—that "there are grounds on which the Pennsylvania decisions could be distinguished" (Appendix, p. 27a). We need say no more. The Court of Appeals was also influenced, as it says (Appendix, p. 27a), by the fact that the general law of agency appears to be moving in this direction. It is significant, however, that the trend—if trend there be—has stopped short of the situation in the case at bar, as plainly appears by the court's own reference to Restatement of Agency 2d § 120, and comment.

The best answer, perhaps, to the point of continuing agency of an attorney following death of his client is F. R. Civ. Proc. 25(a) itself. It requires that the papers on a motion for revival be served personally on the representative who is to be substituted for a deceased party. This is a plain—though tacit—recognition of the fact that the attorney for the decedent is out of the case and represents no one in the action after death of the client. Otherwise, if the attorney-client relationship was deemed to continue, it would be enough to serve the former attorney. The continuance of this relationship does not the least bit depend on notice of death brought home to the adverse party.

POINT III

The Court of Appeals erroneously modified the *Erie-Tompkins* doctrine as applied to conflicts of laws by according precedence to F. R. Civ. Proc. 25(a) over the law of New York as laid down by its highest court in the circumstances of this case.

The legal rules to be applied here are the same as if the action were still pending before the court of the state in which the federal court is sitting. If the state court from which the case was removed does not have jurisdiction—as here—to grant the relief sought by the plaintiffs herein, the federal court is equally powerless. (See *Young* v. *Moore*, 127 F. Supp. 265, 267; *Knoop* v. *Anderson*, 71 F. Supp. 832, 839-840, 845; *Panzram* v. *O'Donnell*, 48 F. Supp. 74.)

"Our starting point must be the policy of federal jurisdiction which *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, embodies." (*Guaranty Trust Co.* v. *York*, 326 U. S. 99, 101.) What has already happened in this case suggests that the *Erie-Tompkins* rule of policy for federal courts bears repeating at this point. In language easy for all to understand Mr. Justice Brandeis wrote as follows (p. 78 of 304 U. S.):

> "• • • Except in matter governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."

In *Baltimore & Ohio Railroad Co.* v. *Joy*, 173 U. S. 226, where—as here—the action had been transferred from the state to the federal court on the ground of diversity, it was held that whether a pending action may be revived in a

federal court upon the death of either party, and proceed to judgment, depends primarily upon the law of the jurisdiction in which the action was commenced.

Other cases to the same effect in holding that "revival" as distinguished from "survival" of a cause of action is governed by the law of the forum are *Page* v. *United Fruit Co.*, 1 Cir., 3 F. 2d. 747, 754; rev. oth. grd. sub nom. *Northern Ry. Co.* v. *Page*, 274 U. S. 65; *Wing* v. *M'Callum*, 1 Cir., 292 F. 810; *Portland Gold Min. Co.* v. *Stratton's Independence*, 196 F. 714, app. dism. 8 Cir., 211 F. 1022; *Lawrence* v. *Southern Pac. Co.*, 177 F. 547; *Gordon* v. *Chicago, R. I. & P. Ry. Co.*, 154 Ia. 449.

Thus we are brought to a consideration of the law of the forum on the question of "revival" as it affects jurisdiction to continue this action against the estate of the deceased defendant. If, as required under the *Erie-Tompkins* rule, we turn to the law of New York, it will be seen that there is no authority, statutory or otherwise, to substitute a foreign representative as party defendant in the place and stead of a deceased non-resident and continue an action *in personam* against his non-resident administratrix. The New York courts follow the well-established rule of the common law that legal representatives are creatures of the jurisdiction of appointment without power to act outside the jurisdictional limits of the court which appointed them. (See *McMaster* v. *Gould*, 240 N. Y. 379; *Helme* v. *Buckelew*, 229 N. Y. 363; *Hopper* v. *Hopper*, 125 N. Y. 400; *Petersen* v. *Chemical Bank*, 32 N. Y. 21; *Parsons* v. *Lyman*, 20 N. Y. 103; *Doolittle* v. *Lewis*, 7 Johns. Ch. [N. Y.] 45; *Matter of Gantt [Hurtado & Cia]*, 286 App. Div. [N. Y.] 212; *Matter of Rogers*, 225 App. Div. [N. Y.] 286.)

In the *McMaster* case the New York Court of Appeals held that the court had no power to make substitution of a foreign representative in a pending suit *in personam*

against a deceased non-resident, and stated, *inter alia*, as follows (p. 385 of 240 N. Y.):

> "The foreign administrator as the official of another sovereignty exists only by virtue of the statute of another state, and has no legal existence in this state."

The New York law is not rendered inapplicable here by reason of the circumstance that the accident occurred out of the state. In *Cosgrove* v. *Weierman*, 3 App. Div. 2d [N. Y.] 940, the plaintiff suffered injuries as the result of an automobile accident in New Jersey. The plaintiff sued the defendant, a resident of New Jersey, in the Supreme Court of New York. During the pendency of suit the defendant died, and an executrix of his estate was appointed in New Jersey. The plaintiff moved to substitute the foreign executrix as party defendant and continue the action in New York. The Appellate Division affirmed an order that denied the motion for substitution.

In *Bennett* v. *Harrisville Combing Mills*, 204 Misc. [N. Y.] 279, the court pointed out what is equally applicable here (p. 280):

> "* * * The action being *in personam*, this court has lost jurisdiction over the person of the defendant Levy. Civil Practice Act, Section 84, permitting the continuance of an action against a deceased party's legal representative, has no application to legal representatives appointed outside of the State of New York."

This aspect of the case, of course, presents a problem arising under the law of conflicts. The New York decisions are fully in accord with the rule of the Restatement, Conflicts, § 512, against revival and continuance of a suit against a foreign domiciliary representative of a deceased defendant. (See New York Annotations.)

This rule of conflicts has also been recognized and applied in our federal courts. For instance, in *Lawrence* v. *Southern Pac. Co.*, 177 F. 547, it was said (p. 550):

> "• • • Nor can a suit be revived against executors in some state other than that in which they have been authorized to act in their representative capacity, unless ancillary letters shall be obtained in the state where the action is pending."

Again, in *Filer & Stowell Co.* v. *Rainey*, 120 F. 718, it was held that the action could not be continued against the foreign executor, where the defendant left no property or estate within the jurisdiction.

See, also, *Burrowes* v. *Goodman*, 2 Cir., 50 F. 2d 92, cert. den. 284 U. S. 650, applying the New York law and holding that a Pennsylvania executrix could not force herself upon the court *even by a voluntary appearance* so as to confer jurisdiction in an action to collect an assessment against a deceased stockholder under the National Banking Act.

As appears, therefore, under the New York decisions it is clear that the state court—where this lawsuit began—would be without jurisdiction and lack power to substitute the foreign administratrix of the deceased defendant and revive the action against his estate in New York. The federal court sitting in the same jurisdiction should apply the law of the state and exercise no greater power in the premises. The federal policy of following the conflicts rule of the state is all the more strong and firmly fixed since the *Erie-Tompkins* decision. In *Waggaman* v. *General Finance Co.*, 3 Cir., 116 F. 2d 254, it was declared that (p. 257):

> "• • • In further effectuation of the policy of federal jurisprudence enunciated in *Erie Railroad Co.* v. *Tompkins* • • •, it would seem proper for a federal

court to follow the rule of the State of the forum on a question of conflict of laws."

The *imprimatur* of the Supreme Court was given to this view in *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, which was an action by a New York corporation in the federal court of Delaware to recover damages for breach of a contract to be performed in New York. The case was concerned with whether the right to interest on the recovery was governed by New York or Delaware law. As the Supreme Court put it (p. 494): "The principal question in this case is whether in diversity cases the federal courts must follow conflict of laws rules prevailing in the states in which they sit." The lower court was reversed for failing to apply the law of Delaware, where the action was brought. Mr. Justice Reed spoke for an unanimous court in language most apt and pertinent to our purpose. Thus (p. 496 of 313 U. S.):

"• • • The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. See *Erie R.* v. *Tompkins*, *supra*, at 74-77. Any other ruling would do violence to the principle of uniformity within a state, upon which the *Tompkins* decision is based."

It takes only little effort to see the application of these words to the case at bar. The error in refusing to apply the law of New York clearly emerges. It was apparently overlooked what the Supreme Court said in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, that (pp. 108-109):

"• • • *Erie R. Co.* v. *Tompkins* • • • expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In

> essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State Court. The nub of the policy that underlies *Erie R. Co.* v. *Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result. * * *"

Needless to say, the result reached in the case at bar runs counter to the "nub" of the *Erie-Tompkins* doctrine and the intent of that decision. The out-of-State party in this instance has met with a result "substantially different" from what it would have been if the action had remained in the state court less than a block away.

With the law of New York, as we have seen, plainly stated and established by a long line of decisions—and applicable here under the *Erie-Tompkins* doctrine—the effect of the decision in this case is to exalt F. R. Civ. Proc. 25(a) to a place of precedence over the law of the state in which the District Court sits. To this extent the decision amounts to a limitation or modification of the *Erie-Tompkins* doctrine as applied to conflicts of laws in *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487.

If, however, the rule must yield to the law of the state —as it should—there is no need for alarm nor any basis for a feeling of judicial frustration in the circumstances. The exceptional situation here should not be allowed to alter the course of jurisprudence and disturb the symmetry established by a long line of decisions in this area of conflicts. As we believe, the Supreme Court had no such intention in the adoption of F. R. Civ. Proc. 25(a).

CONCLUSION

It is respectfully submitted that the foregoing considerations warrant allowance of the writ sought by the petitioner.

Dated: New York, N. Y., February 23, 1960.

Respectfully submitted,

JOHN R. SHENEMAN,
Counsel for Petitioner.

JOSEPH A. DORAN,
JOHN E. MORRIS,
of Counsel.

APPENDIX

Opinion and Order of District Court.

NOONAN, D. J.

The plaintiff has moved for an order allowing the substituting of Frances E. Carlin as administratrix, in place of George Waterson, deceased, and allowing the service of an amended complaint.

The administratrix, appearing specially in opposition to this motion, contends that:

1. Rule 25 (a) 1 of the Federal Rules of Civil Procedure forecloses this court from granting this relief;

2. That this court must apply New York Law which also prohibits the substitution of a foreign administratrix and,

3. The court has lost jurisdiction over the subject matter of this action.

Rule 25 (a) 1 of the Federal Rules of Civil Procedure recites as follows:

"(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district."

The administratrix contends that the language of Rule 25 wherein it is stated that an action "shall be dismissed as to the deceased party" must be construed literally, and cites the case of *Anderson* v. *Yungkau*, 329 U. S. 482 as the ruling authority.

There is little doubt that up to 1948 the *Anderson* case (supra) controlled situations such as the one before us now. After the Revision Act of 1948 repealed 28 U.S.C. 778, the case of *Anderson* v. *Yungkau* (*supra*), which was based upon this statute, lost its controlling force.

Before we can intelligently discuss the scope of Rule 25 we must study 28 U.S.C. 2072 Rules of Civil Procedure for district courts which reads, in part, as follows:

> "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States and of the District Court for the Territory of Alaska in civil actions.
>
> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution. • • •"

It can thus be seen that the Rules cannot deprive a party of a substantive right. For this reason we cannot accept the interpretation of this Rule proposed by the Administratrix for to do so would render Rule 25 invalid.

We believe that this was firmly established by *Perry* v. *Allen*, 239 F. 2d. 107 (C.C.A. 5th) at page 112, Circuit Judge Cameron states:

> "Under these tests, we hold that Rule 25 (a) (1) is not a Statute of Limitations and is invalid insofar as it attempts to abridge appellant's substantive right to bring his civil action to trial on its merits, by

placing a categorical and inflexible time limit upon his right to substitute the collector's administrator. Such an attempt is outside the mandate and inside the caveat of the Act of Congress."

In April of this year Judge Bruchhausen of the Eastern District of New York, in *Henebry* v. *Sims*, 22 F.R.D. 10, followed the rule of *Perry* v. *Allen*.

Overruling the administratrix's first contention we turn now to the second claim that the case of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 compels us to deny this application for leave to substitute the administratrix since such substitution is not allowed by the law of New York.

Assuming that the law of New York is as stated in the memorandum submitted in opposition, it cannot be applied in cases such as this without destroying Rule 25 in cases in our court under diversity of citizenship. The case of *Neiman-Marcus* v. *Lait*, 17 F.R.D. 119 (S.D.N.Y. 1954) is in agreement. Judge Bicks stated on page 120:

"In resisting this application counsel for the executrix urges that this Court lacks authority to grant the requested relief, citing State Court cases holding that a foreign executor or administrator may not be sued in the State Court.

This argument fails to recognize the distinction between original jurisdiction and retaining it in a pending cause. The effect of substituting the executrix is to continue the existing action against the testator and not to institute one against the executrix." (Citation omitted)

We, therefore, hold that New York law is inapplicable and no bar to our allowing the substitution sought herein.

The administratrix's contention that the court lost jurisdiction in this action when the defendant died is not worthy

of comment since to so hold would render Rule 25 a complete nullity and deny the court power to impose nunc pro tunc rulings.

So ordered.

Dated, New York, N. Y.
December 1st, 1958.

G. F. NOONAN
U.S.D.J.

Rec'd in Clerk's Office 12/2/58.

Appendix

Amended Order and Certificate.

NOONAN, D. J.

The defendant has moved this court for an order amending or resettling the decision and order filed on December 2, 1958. The defendant's application is granted insofar as the order and decision dated December 1, 1958 is hereby amended on the fourth page of said memorandum, and between the word "rulings" and the words "So ordered," the following paragraph is hereby inserted:

"The plaintiff's motion for an order allowing the substitution of Frances E. Carlin as Administratrix in place of George Waterson, deceased, and allowing the service of an amended complaint is granted. In granting this motion the court realizes that this order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

So ordered.

Dated, December 30, 1958.

G. F. NOONAN,
U.S.D.J.

Appendix

Decision on Motion for Interlocutory Appeal.

UNITED STATES COURT OF APPEALS.

FOR THE SECOND CIRCUIT

SAVERIO D. IOVINO and LEONARD P. LUISI,

Plaintiffs-Appellees,

v.

GEORGE WATERSON,

Defendant,

FRANCES E. CARLIN, as administratrix of George Waterson, Sr., deceased,

Substituted Defendant-Appellant.

Defendant's motion for leave for an interlocutory appeal.

The appeal is permitted in accordance with 28 U.S.C. § 1292(b). The motion to resettle the order below was made within 10 days and was timely as was the later motion to us, in accordance with the principles stated in *Milbert* v. *Bison Laboratories*, 3 Cir., 260 F. 2d 431.

C.E.C.
J.W.M.
C.C.H.
U.S.J.J.

Feb. 6, 1959

Appendix

Order Allowing Interlocutory Appeal.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of February, one thousand nine hundred and fifty-nine.

Present: HON. CHARLES E. CLARK,
Chief Judge,
HON. J. WARREN MADDEN,
Judge, Court of Claims,
HON. CARROLL C. HINCKS,
Circuit Judge.

SAVERIO D. IOVINO AND LEONARD P. LUISI,
Plaintiffs,

v.

GEORGE WATERSON,
Defendant.

FRANCES E. CARLIN, as administratrix, etc.,
Substituted Defendant.

A motion having been made herein by counsel for the substituted defendant for leave to appeal from a certain order of the District Court dated December 30th, 1958,

Upon consideration thereof, it is

Ordered that the said motion be and hereby is granted in accordance with 28 U.S.C. § 1292(b).

A. DANIEL FUSARO,
Clerk.

Appendix

Opinion of Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 20—October Term, 1959.

(Argued October 9, 1959 Decided December 1, 1959.)

Docket No. 25575

SAVERIO D. IOVINO and LEONARD P. LUISI,
Plaintiffs-Appellees.

—v.—

GEORGE WATERSON, SR.,
Defendant.

FRANCES E. CARLIN, as Administratix of George Waterson, Sr., Deceased,
Substituted Defendant-Appellant.

Before:

LUMBARD, WATERMAN and FRIENDLY,
Circuit Judges.

Appeal, pursuant to 28 U. S. C. § 1292(b), from an order of the District Court for the Southern District of New York, Gregory F. Noonan, *Judge*, granting plaintiff's motion under F. R. 25(a)(1) to substitute Frances E. Carlin, administratrix *ad litem* appointed by the Camden County Court, Probate Division, State of New Jersey, in place of defendant, George Waterson, deceased. Order affirmed.

ROBERT M. REAGAN, New York, N. Y. (Abrams & Fastenberg, Bronx, N. Y. and Gustave G. Rosenberg and Lawrence M. Rosenberg, New York, N. Y., on the brief), *for Plaintiffs-Appellees.*

JOSEPH A. DORAN, New York, N. Y. (John Morris, New York, N. Y., on the brief), *for Substituted Defendant-Appellant.*

FRIENDLY, *Circuit Judge:*

The question is whether, in a suit removed to the Southern District of New York because of diversity of citizenship, the District Court could order substitution of an administratrix *ad litem* of the defendant appointed in New Jersey, under F. R. Civ. Proc. 25(a)(1), quoted in footnote 2 below, although application for this was not made until more than two years after defendant's death. We hold that it could.

The suit was brought by plaintiffs, residents of New York, to recover for personal injuries sustained in Virginia in December, 1954, while passengers in an automobile owned by defendant and operated by his son, who was killed. The action was begun in March, 1955, in the Supreme Court, New York County, by the service of summons in New York on Waterson, a resident of New Jersey. The defendant removed to the District Court. On April 24, 1955, Waterson died intestate. He left no property in New York, other than such rights of exoneration or indemnity, if any, as he may have had from insurers in connection with the claims here asserted. Plaintiffs' attorneys remained ignorant of defendant's death, and the attorney who appeared for Waterson and now appears as attorney of record for the administratrix asserts that he likewise was. In May, 1955, plaintiffs' attorneys served a complaint on the attorney who had

appeared for Waterson. The latter accepted service, served an answer, and, in 1956, examined plaintiffs before trial and participated in pre-trial conferences before the District Court. No mention was made of Waterson's death.

It was not until the spring of 1958 that plaintiffs' attorneys learned of this. They promptly took appropriate proceedings in New Jersey for the appointment of an administratrix *ad litem* and then moved in the District Court for an order substituting her as defendant in this action and granting them leave to serve an amended complaint. Over the objection of the administratrix, the District Court granted the relief sought. On motion made by the administratrix within 10 days thereafter, the District Court amended its order to include the certificate required as a premise for a motion for leave to appeal under 28 U. S. C. A. § 1292(b). This Court granted such leave.

The order substituting the New Jersey administratrix can stand only if plaintiffs are able to establish each of the following propositions:

I. F. R. Civ. Proc. 25(a)(1) permits the substitution of personal representatives of non-residents as well as of resident decedents.

II. A Federal Rule permitting the substitution of the personal representative of a non-resident decedent does not violate the due process clause of the Fifth Amendment.

III. Application of a Federal Rule permitting the substitution of the personal representative of a non-resident decedent in a suit where Federal jurisdiction is based on diversity of citizenship and in a state that has not permitted such substitution, is not beyond the scope of the act, 28 U. S. C. A. § 2072, authorizing the Supreme Court to establish rules for "the practice and procedure of the district courts of the United States" and does not go beyond Federal legislative power.

IV. Plaintiffs are not precluded from effecting substitution under F. R. Civ. Proc. 25(a)(1) because of their failure to act within the two-year time limit there provided.

We shall examine these propositions and set forth our reasons for believing that plaintiffs can carry each of them.

I.

F. R. Civ. Proc. 25(a)(1) permits the substitution of personal representatives of non-residents as well as of resident decedents.

The provisions of F. R. Civ. Proc. 25(a)(1) in regard to substitution must be considered in the light of the development of the law as to the revivor of actions against foreign administrators in state and Federal courts. This we shall now summarize.

The American Law Institute's Restatement of the Law of Conflict of Laws states, § 512, "No action can be maintained against any administrator outside the state of his appointment upon a claim against the estate of the decedent." A comment says this rule applies "although the action in which it is now sought to make the former administrator a party was begun against the decedent in his lifetime and the Court had jurisdiction over his person." In the view of the reporter, this doctrine, to which he was deeply attached, rested not merely on the difficulties that such an action would cause to orderly administration but "upon a much more fundamental reason than mere expedience," 3 Beale, Conflict of Laws 1553.[1]

[1] Professor Beale elaborated this as follows: "The court in this case * * * [would be] attempting to impose an obligation owed by the deceased upon another person, his executor. Such an imposition could be made only by a sovereign having power over the executor * * * By taking upon him the administration of the estate

(*Footnote continued on following page*)

The rule of the Restatement was supported by decisions of the courts of New York. In *Helme* v. *Buckelew*, 229 N. Y. 363, 128 N. E. 216 (1920), Judge Cardozo had expounded the received doctrine and, in order to avoid constitutional doubts, had construed § 1836(a) of the Code of Civil Procedure, Laws, 1911, ch. 631, which had granted broad permission for foreign executors and administrators to sue or be sued, as authorizing only suits by them and those suits against them where "the subject matter subjects them to the jurisdiction" (p. 373). Five years later the New York Legislature, in an amendment to § 160 of the Decedent Estate Law, provided for revivor against foreign executors and administrators in language that defied the negating construction of *Helme* v. *Buckelew*. The Court of Appeals answered, in an opinion by Judge Pound, that "on the authority of recent and persuasive *dicta* in *Helme* v. *Buckelew (supra)*, as herein enlarged, the constitutional requirement of due process of law precludes the legislature from providing generally for continuing judgments *in personam* against the foreign executors or administrators of deceased defendants." *McMaster* v. *Gould*, 240 N. Y. 379, 388, 148 N. E. 556 (1925). The Court made clear just what due process requirement it had in mind by quoting (p. 385) from *Pennoyer* v. *Neff*, 95 U. S. 714, 733 (1878).

The Federal courts in New York had earlier reached the same result, *Laurence* v. *Southern Pacific Co.*, 177 Fed. 547

(*Footnote continued from preceding page*)

in the state of his appointment he submitted to the obligations which the administration entailed under the laws of that state, but he submitted to none which rose under the laws of another state. To render judgment against him in another state would be forcing him against his will to pay another man's debts." 3 Beale, The Conflict of Laws, 1554 (1935). The treatise draws no distinction between initiating and reviving suits against foreign personal representatives. In Professor Beale's view even consent by the foreign personal representative was ineffective. He permitted an exception only where it could be affirmatively shown that the courts of the appointing state would recognize the judgment. 3 *id.* at 1555-58.

(E. D. N. Y. 1910); *Stromeyer Co.* v. *Aldrich*, 227 Fed. 960 (S. D. N. Y., 1915). Indeed, Judge Learned Hand's opinion in *Thorburn* v. *Gates*, 225 Fed. 613 (S. D. N. Y. 1915) was a precursor of the construction of § 1836(a) of the Code of Civil Procedure later adopted by Judge Cardozo in *Helme* v. *Buckelew*. Once the New York courts had spoken, the Federal courts in New York would have followed the New York decisions, even without benefit of *Erie*, so long as Congress had not given a contrary direction, *Baltimore & Ohio R. R.* v. *Joy*, 173 U. S. 226 (1899).

In 1921 Congress gave such a direction. Ever since the first Judiciary Act, Rev. Stat. § 955, it had been provided that "When either of the parties, whether plaintiff or petitioner or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment." By the Act of November 23, 1921, 42 Stat. 323, Congress amended this provision, then embodied in 28 U. S. § 778, by adding a new paragraph that "the jurisdiction of all courts of the U. S. shall extend to and over executors and administrators of any party, who dies before final judgment or decree, appointed under the laws of any State or Territory of the United States, and such courts shall have jurisdiction within two years from the date of the death of the party to the suit to issue its *scire facias* to executors and administrators appointed in any State or Territory of the United States which may be served in any judicial district by the marshal thereof." The legislative history placed it beyond doubt that the intention was to reverse for the Federal courts the rule of no revivor by or against administrators or executors appointed by the courts of another state or territory. H. R. Rep. No. 429, 67th Cong., 1st Sess., 1-2, 61 Cong. Rec. 7056.

The Federal courts applied the 1921 amendment in accordance with its language and declared purpose. *Luster v. Martin*, 58 F. 2d 537 (7th Cir.), *cert. denied* 287 U. S. 637 (1932); *Plimpton v. Mattankeunk Cabin Colony*, 6 F. Supp. 72 (D. Conn. 1934), and cases cited. No consideration appears to have been given at the time to whether the difficulties that had led the Court of Appeals to hold the act of the New York legislature offensive to the due process requirements of the Fourteenth Amendment created any problem for Congress under the Fifth. Nor in those days, when "*Erie* was still hidden in the mist of the future," *Robert Lawrence Co. v. Devonshire Fabrics*, 2d Cir., Docket No. 25209, Oct. 28, 1959, was question raised whether the 1921 enactment went beyond Federal legislative power.

Federal Rule 25(a)(1), which we quote in the margin,[1] carried forward 28 U. S. C. A. § 778, including the 1921 amendment permitting revivor by or against foreign administrators or executors. Although the simple phrase used in the Rule, "substitution of the proper parties," might not alone have sufficed to evidence that intent, the retention of the 1921 provision for service "in any judicial district" and the note of the Advisory Committee make it plain that the purpose was to include the 1921 amendment for revivor by or against foreign personal representatives. 4 Moore Federal Practice ¶25.05, at 518 (2d ed. 1950).

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[1] "Substitution of Parties

"(a) Death.

"(1) If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district."

Appendix

II.

A Federal Rule permitting the substitution of the personal representative of a non-resident decedent does not violate the due process clause of the Fifth Amendment.

Whether or not the Fourteenth Amendment bars New York from enacting a general statute bringing foreign administrators into suits validly commenced against their decedents, we think the Fifth Amendment creates no bar to such action by Congress.

Since "Congress could provide for service of process anywhere in the United States," *Mississippi Publishing Corp.* v. *Murphree*, 326 U. S. 438, 442 (1946), it could have authorized the plaintiffs to sue in the Federal courts in New York and obtain jurisdiction of Waterson by service in New Jersey, as it has done in actions of many other sorts, 2 Moore, Federal Practice, ¶4.42 (2d ed. 1947). If Congress could thus have authorized service of process on Waterson in New Jersey, there would seem to be no greater due process objection to its authorizing the substitution of an administrator appointed by New Jersey. See *Commercial Solvents Corp.* v. *Jasspon*, 92 F. Supp. 20 (S. D. N. Y. 1950). And even if it would be an unconstitutional intrusion on the sovereignty of New Jersey for New York to permit an action properly commenced against a New Jersey decedent to continue against his personal representative, a proposition which we deem doubtful, cf. *Morris* v. *Jones*, 329 U. S. 545 (1947), no such objection could prevail against the United States. For while New Jersey may not have yielded to a sister state power over an administrator appointed by its courts, it has yielded to the United States the power to take such action, consistent with procedural fairness, as is appropriate to make effective the grant of judicial power in Article III over controversies between "Citizens of different States."

Appendix

III.

Application of a Federal Rule permitting the substitution of the personal representative of a non-resident decedent in a suit where Federal jurisdiction is based on diversity of citizenship and in a state which has not permitted such substitution, is not beyond the scope of the act, 28 U. S. C. A., § 2072, authorizing the Supreme Court to establish rules for "the practice and procedure of the district courts of the United States" and does not go beyond Federal legislative power.

Two other objections are made to the validity of F. R. 25(a)(1) as here sought to be applied. The first is that if the Rule is construed to permit the substitution of Waterson's administratrix, the Rule would go beyond the authority conferred on the Supreme Court by the Enabling Act, 28 U. S. C. A. § 2072, to prescribe "the practice and procedure of the district courts of the United States" and would offend the direction in that Act that the rules "shall not abridge, enlarge or modify any substantive right." The second is that if the Rule is so construed and applied in a case such as this, where jurisdiction rests solely on diversity of citizenship, it transcends Federal legislative power. *Erie R. R.* v. *Tompkins*, 304 U. S. 64 (1938).

The first objection would clearly have been without substance between the effective date of the Federal Rules in 1938 and the repeal of 28 U. S. C. A. § 778 by the Revision Act of 1948. During that decade the Rule permitting the substitution of foreign administrators and executors paralleled the statute. We think it would be a reversion to the formalism of a bygone age to hold that the repeal of 28 U. S. C. § 778 by the Revision Act for the stated reason that Fed. R. Civ. Proc. 25(a)(1) rendered § 778 unnecessary invalidated the very Rule whose existence was the avowed reason for the repeal. On the contrary, this action of Congress seems to evidence its belief in the con-

sistency of the Rule with the Enabling Act. Moreover, whatever the applicability of an "outcome determinative" test to a conflict between Federal and state practice in diversity litigation may be, it would unduly restrict the grant of authority made by Congress to hold that a rule contravenes the Enabling Act as abridging, enlarging or modifying substantive rights merely because a provision admittedly procedural in nature either furthers or prevents the enforcement of such rights. For example, Fed. R. Civ. Proc. 37 provides that in the event of refusal to comply with discovery requests the court may make an order "refusing to allow the disobedient party to support or oppose designated claims or defenses * * *" Nothing could be better calculated to prevent the ultimate vindication of a "substantive right"; yet surely this Rule is within the scope of the power conferred by Congress. Cf. *Sibbach* v. *Wilson & Co.*, 312 U. S. 1 (1941).

We turn therefore to the objection based on constitutional grounds. It has been said that "the question of substitution is procedural, recognized by the rules as such, and not controlled or governed by local law." *Jones* v. *Schellenberger*, 196 F. 2d 852, 854 (7th Cir.), *cert. denied*, 344 U. S. 876 (1952). See also 105 U. Pa. L. Rev. 1088, 1102. The analysis to support this conclusion in the instant case would be that the only substantive rights here are those created by the Virginia Law of torts and recognized by the New York law of conflict of laws. Place steps relating to the enforcement of these rights in New York against Waterson during his life or his representative after his death would be not substantive but procedural.

We have been warned, however, against too ready reliance on such a conceptual analysis. *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 109 (1945). And appellant contends that an application of Fed. R. Civ. Proc. 25(a)(1) to bring her before the District Court, even in an action

validly commenced against her decedent, would run counter to the statements in *Guaranty Trust Co.* v. *York* (at p. 109) that the intent of *Erie RR.* v. *Tompkins*, *supra*, "was to insure that, in all cases where a Federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the Federal court should be substantially the same so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court," and that "for the same transaction the accident of a suit by a non-resident litigant in a Federal court instead of in a state court a block away should not lead to a substantially different result." Literally appellant may be right. But we do not believe we can properly decide this case by a mere literal reading of *Guaranty Trust Co.* v. *York* any more than by applying the litmus-paper test there condemned. We think at least two factors make this a different case from *Guaranty Trust Co.* v. *York* and call for a different result.

The first is that whereas in *Guaranty Trust Co.* v. *York* there was a declared policy of New York, embodied in statute, that the action should not proceed, in no real sense can New York be said to have a policy against revivor against a foreign administrator. In 1911 and again in 1925, as we have seen, the New York Legislature endeavored to provide generally for such revivor. It failed only because the Court of Appeals then thought this would transgress limits placed upon New York by the Fourteenth Amendment.[3] See *Leighton* v. *Roper*, 300 N. Y. 434, 439, 91 N. E. 2d 876, 879 (1950). The substitution provisions of § 84 of

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[3] Section 1836(a) of the Code of Civil Procedure was omitted from the Civil Practice Act, Laws, 1920, ch. 925. The Legislature repealed § 160 of the Decedent Estate Law, Laws, 1926, ch. 660, in the light of *McMaster* v. *Gould*, *supra*. However, by Laws, 1951, ch. 522, the Legislature resurrected former § 160 to the extent of authorizing suits by foreign executors and administrators.

the Civil Practice Act, viewed simply as a matter of language and apart from the negative judicial gloss arising from supposed "problems of constitutional power" affecting New York but not the United States, are broad enough today to cover a foreign personal representative. When the New York Legislative amended § 52 of the Vehicle and Traffic Law in 1945, Laws, ch. 719, to provide that suits may be revived or even instituted against non-resident administrators or executors for damages sustained as a result of the operation of foreign-owned automobiles within the state, the Court of Appeals, in *Leighton* v. *Roper, supra*, sustained this against constitutional attack based on the doctrine of *McMaster* v. *Gould, supra*. The Court held that by driving his automobile into the state, the decedent "has consented to the statutory agency for the receipt of process and has made that consent binding upon his administrator." 300 N. Y. at 441, 91 N. E. 2d at 880. It would not be a long step from this for the Court of Appeals to reason, despite the constitutional fears of *McMaster* v. *Gould, supra*, that if a non-resident enters New York and is personally served with process there, he likewise shall be deemed to have "consented" that his administrator should be subject to jurisdiction as the decedent was; and, as pointed out above, the words of § 84 of the Civil Practice Act are already adequate to that end.

A further ground of distinction is that the statements in *Guaranty Trust Co.* v. *York* related to action by a Federal court in the absence of Federal legislation directed to the point. This was the situation also in *Angel* v. *Bullington*, 330 U. S. 183 (1947), so far as relevant, in *Woods* v. *Interstate Realty Co.*, 337 U. S. 535 (1949), and, as the Court read Fed. R. Civ. Proc. 23(b), in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949). *Bernhardt* v. *Polygraphic Co. of America*, 350 U. S. 198 (1956), did concern a Federal statute, but the decision went only so far as to read the statute narrowly to avoid a constitutional is-

sue, a solution which the history of Fed. R. Civ. Proc. 25 (a)(1) makes unavailable here. Cf. *Robert Lawrence Co. v. Devonshire Fabrics, supra.* Of the decisions holding state to override Federal procedural law, only *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530 (1949), seems in the same general area as the instant case; but there the Court was dealing with the express command of a state statute of limitations which "brought the cause of action to an end." The Court did not hold Fed. R. Civ. Proc. 3 to be invalid as prescribing a method for commencing a diversity suit in the Federal courts different from the state practice, but rather that the action taken under the Federal Rule, which was sufficient to start the suit, was not sufficient to toll a state statute of limitations that required more.

On the other hand, the Supreme Court has declined to direct a district court to apply a state procedural rule confiding decision to the judge alone, although "were 'outcome' the only consideration, a strong case might appear for saying that the Federal court should follow the state practice." *Byrd* v. *Blue Ridge Rural Electric Cooperative*, 356 U. S. 525, 537 (1958). It has held that the Article III grant of Federal judicial power in "all Cases of admiralty and maritime Jurisdiction" enables a Federal rule to overcome "procedural niceties" of a state with respect to the beginning of a suit by an administrator, *Levinson* v. *Deupree*, 345 U. S. 648 (1953). And, despite the careful reservation made in *Deupree* with respect to diversity cases, we find nothing in the language or history of the grant of Federal judicial power in the same Article III over controversies between "Citizens of different States," nothing in the early legislation applying that grant,[1] and

[1] Both the 34th section of the Judiciary Act of 1789, 1 Stat. 92 and section 2 of the Process Act of 1789, 1 Stat. 93, which applied

(*Footnote continued on following page*)

no actual decision of the Supreme Court that would compel a conclusion that Congress lacks power to establish uniform rules of revivor for the Federal courts "in all suits of a civil nature" including those based on diversity of citizenship, even though this may result in a particular plaintiff or defendant obtaining better or worse treatment in the Federal than in the state court. We are dealing with a subject-matter which, though "outcome determinative" has long been regarded as procedural by lawyers, by legislators and by the Supreme Court itself, *Baltimore & Ohio R. Co.* v. *Joy, supra*. We believe revivor falls in what Judge Magruder called, although, to be sure, before *Guaranty Trust Co.* v. *York*, "a twilight zone * * * where a rational classification could be made either way, and where Congress directly or the Supreme Court under the authority of the Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. A. §§ 723b, 723c, would have power to prescribe a so-called rule of procedure for the Federal Courts." *Sampson* v. *Channell*, 110 F. 2d 754, 756-57 (1st Cir.), *cert. denied* 310 U. S. 650 (1940). Our holding is only that in this limited area Congress may use its power to "provide for service of process anywhere in the United States" in such a manner that in all suits properly in the Federal courts by or against United States citizens, including diversity suits, substitution of their personal representatives may be had on their decease. This is an area where the positive inference from Article III and the "necessary and proper" clause outweighs the negative in-

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(*Footnote continued from preceding page*)

to all actions at law, including the large class where Federal jurisdiction rested on diversity of citizenship, excepted cases where acts of Congress "otherwise require or provide." On the best of grounds, the Supreme Court has recognized the first Judiciary Act to be "contemporaneous and weighty evidence of its [Article III's] true meaning." *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 297 (1888). See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1923).

ference from the limited grant of legislative power in Article I, § 8, and the Tenth Amendment that must have afforded the basis for the constitutional precept of *Erie*.

IV.

Plaintiffs are not precluded from effecting substitution under F. R. Civ. Proc. 25(a)(1) because of their failure to act within the two year time limit there provided.

If we are right in what has been said up to this point, an order substituting Waterson's administratrix here would have been proper, despite the contrary practice in the New York courts, if substitution had been effected within the two-year period prescribed by F. R. Civ. Proc. 25(a)(1). However, this was not done, for reasons stated at the outset. The District Court overcame this by holding, on the authority of *Perry* v. *Allen*, 229 F. 2d 107 (5th Cir. 1956),[6] that as a result of the 1948 repeal of 28 U. S. C. § 778 the two-year limitation in Rule 25(a)(1) was no longer valid since it abridges a substantive right and thus offends the Enabling Act.[7]

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[5] For whatever importance it may have, it would seem highly unlikely that differences in Federal and state rules as to revivor would lead to the kind of forum-shopping of which *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.*, 276 U. S. 518 (1928), cited by Mr. Justice Brandeis in *Erie*, 304 U. S. at 75, was so outrageous an example and which is likely also to occur where statutes of limitations are concerned, as in *Guaranty Trust Co.* v. *York*.

[6] This decision relied heavily on the views expressed by Professor Moore, 4 Federal Practice ¶ 25.06, at 522-23.

[7] The District Courts in this circuit have divided as to the continued validity of the two-year limitation in Fed. R. Civ. Proc. 25(a)(1). Judge Noonan in the instant case and Judge Bruchhausen in *Heuchry* v. *Sims*, 22 F. R. D. 10 (E. D. N. Y. 1958).

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(1) For reasons indicated above, we are not inclined to give significance to the repeal of 28 U. S. C. § 778 by the Revision Act. Moreover, with all respect to the judges of the Fifth Circuit, we find no sufficient reason for a view that although the substitution of the personal representative of a decedent is a matter of procedure within the Enabling Act, the placing of a time limit upon this is not. The courts of Colorado and Delaware have held that court-prescribed rules similar to Rule 25(a)(1) placing a two-year limit upon the substitution of the personal representative of a decedent concern procedure and are within the rule-making power. *Film Enterprises* v. *Selected Pictures*, 134 Colo. 454, 306 P. 2d 252 (1957); *Tiffany* v. *O'Toole Realty Co.*, 153 A. 2d 195 (Del. Super. Ct. 1959). Moreover, whatever might be held where revivor was sought after two years against the personal representatives of a resident decedent in the district court of a state allowing a longer period, we can see no basis for holding in this case that the application of a time limit in the very Federal Rule that alone permits the substitution of a foreign personal representative could deprive plaintiffs of any rights. In our view, therefore, the order of substitution can be sustained only if plaintiffs may be treated as if they had met the two-year limitation because a court will not allow defendant to claim the contrary.

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have followed *Perry* v. *Allen*. Judge Weinfeld in *Foltz* v. *Moore-McCormack Lines, Inc.*, 19 F. R. D. 301 (S. D. N. Y. 1956) and Judge Herlands in *Gertler* v. *United States*, 18 F. R. D. 307 (S. D. N. Y. 1955), have rejected it. The decisions by Judges Bruchhausen, Weinfeld and Herlands did not involve revivor against foreign personal representatives. We do not read the footnote in *Vibra Brush Corporation* v. *Schaffer*, 256 F. 2d 681, 683-84 (2d Cir. 1958), as intimating either agreement or disagreement with *Perry* v. *Allen* by this Court. Well-reasoned law review comments have criticized *Perry* v. *Allen*. 45 Cal. L. Rev. 785; 70 Harv. L. Rev. 1471; 105 U. Pa. L. Rev. 1098; 43 Va. L. Rev. 431.

(2) There are weighty indications that no consideration can ever be given to estoppel where there has been failure to comply with the two-year limitation of Fed. R. Civ. Proc. 25(a). These begin with *Anderson* v. *Yungkau*, 329 U. S. 482 (1947), which held that Fed. R. Civ. Proc. 6(b), permitting the court to allow an "act to be done after the expiration of the specified period • • • where the failure to act was the result of excusable neglect," did not apply to Fed. R. Civ. Proc. 25(a)(1) and therefore forbade substitution after the two-year period although it was stipulated that plaintiff had not been lacking in diligence. Next is the amendment of F. R. 6(b) on December 27, 1946, adding Rule 25 as a rule specifically excepted from its operation, in the face of a recommendation from the Advisory Committee that the courts should have power to extend the two-year period of Rule 25(a)(1) on a showing of reasonable excuse. 4 Moore, Federal Practice, ¶25.01 [3], 504-05. There is also the Supreme Court's failure to adopt the recommendation of the Advisory Committee in its report of October 1955 for the deletion of the two-year provision of Rule 25(a)(1) in favor of a rule that the action might be dismissed as to a deceased party if substitution were not made within a reasonable time. Most important of all is the statement, in *Snyder* v. *Buck*, 340 U. S. 15, 19 (1950), that the six months' time limit for substitution prescribed by 43 Stat. 936, 941, the statutory predecessor of Fed. R. Civ. Proc. 25(d), relating to continuation of suits against public officers "was a declared policy of Congress not to be altered by agreement of the parties or by some theory of estoppel." See *Poindexter* v. *Folsom*, 242 F. 2d 516 (3d Cir. 1957), applying this to Rule 25(d).

Impressive as these indications are, there are substantial points of distinction. In *Anderson* the Supreme Court was concerned with excusable neglect, not with estoppel. The

1946 amendment of Rule 6(b) and the rejected amendment of Rule 25(a)(1) were before the Court while *Anderson* was pending; the former simply codified the forthcoming decision in *Anderson* and the latter would have gone far beyond estoppel. The non-adoption of the Advisors' 1955 recommendation shows at most that the Supreme Court preferred a specific to an indefinite time limit. *Snyder* v. *Buck* arose under § 11 of the Judiciary Act of 1925, 43 Stat. 936, 941, relating to the continuation of suits concerning the discharge of official duties of an officer of the United States after he had ceased to hold office. As the Court pointed out (p. 48), such suits relate only "to a duty attaching to the office" which "existed only so long as the office was held," and as to which the successor might well take a different view. For many years it had been held that such actions abated when the official died or retired, and the Act of 1925 was less liberal in preserving them than the previous Act of 1899, 30 Stat. 822. Moreover, the only penalty for failure to make timely substitution is the need for starting a new action if, in fact, the successor continues the conduct complained of; service of process in a new suit against a government officer is never a problem.

Despite these distinctions, we would nevertheless feel constrained to follow the indications thus summarized if there were not also authority to the contrary. *In Bush* v. *Remington Rand, Inc.*, 213 F. 2d 456, 463-65 (1954), relying on the analogy that a statute of limitations can be waived, we held that long continued litigation with knowledge of plaintiff's death estopped a defendant from taking advantage of the two-year limitation of F. R. 25(a)(1), although counsel of distinction pressed upon us—and upon the Supreme Court in a petition for certiorari, denied in 348 U. S. 861 (1954)—that this was in direct conflict with *Anderson* v. *Yungkau* and *Snyder* v. *Buck*. And the principle that estoppel may prevent a defendant from invoking even a most strongly worded limitation received authorita-

tive affirmation when the Supreme Court, at the last term, estopped a defendant from invoking the direction of § 6 of the Federal Employers Liability Act, 45 U. S. C. § 56, that "no action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued," *Glus v. Brooklyn Eastern District Terminal*, 359 U. S. 231 (1959).* The Court based its decision on "the maxim that no man may take advantage of his own wrong," a principle "deeply rooted in our jurisprudence" which "has frequently been employed to bar inequitable reliance on statutes of limitations." (*Id.* at 232-33.) If there be differences in the degree of the imperative in 45 U. S. C. § 56 and in Rule 25(a)(1), our microscope is not powerful enough to perceive them. Finding the authorities thus inconclusive and believing our decision in *Bush* v. *Remington Rand* to be sound in principle, we adhere to it.

(3) The final problem is whether this is a proper case for estoppel. Appellant points out that in *Bush* the estoppel was applied against the live party whereas here it is invoked against the dead one, and relies on the general rule that an agent's authority is revoked by the principal's death. While we recognize the distinction, we do not think it calls for a difference in result. We need not go so far as to hold that an attorney appearing in the courts of this Circuit is under a duty to keep himself and his adversary informed of his continued authority at all times. We do hold that an attorney so appearing must assure himself of the continued existence of his client before he takes affirmative

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* The Courts of Appeals had divided on this question. In addition to our own decision in *Glus*, 253 F. 2d 957, which the Supreme Court reversed, the Third Circuit had held that the three-year period of 45 U. S. C. § 56 could not be tolled even by fraud or concealment. *Damiano* v. *Pennsylvania RR.*, 161 F. 2d 534 (3d Cir.), cert. denied, 332 U. S. 762 (1947). The Fourth Circuit had held the contrary. *Scarborough* v. *Atlantic Coast Line RR.*, 178 F. 2d 253 (4th Cir. 1949), cert. denied, 339 U. S. 919 (1950).

steps in the client's behalf; that, in the absence of knowledge to the contrary, his adversary may properly assume he has done this; that a client who authorizes an attorney to represent him has impliedly so informed the adverse party; and that no advantage may be taken by the client's personal representative of the attorney's failure to ascertain the fact of the client's death. The Supreme Court of Pennsylvania has so held. It said in *In re Hoopes' Estate*, 185 Pa. 167, 39 Atl. 840 (1898) that "No advantage can be taken of the failure to suggest death and have substitution made." And it has reaffirmed this in *In re Stewart's Estate*, 358 Pa. 434, 58 A. 2d 42 (1948), in an opinion by Mr. (now Chief) Justice Jones. Compare *Williams* v. *United States*, 264 F. 2d 227 (6th Cir. 1959), and *Pfeffer* v. *Commissioner*, 2d Cir., Nov. 19, 1959. *Hart* v. *Blabey*, 286 N. Y. 75 (1941), is not to the contrary, since there the proceedings subsequent to death had not created any prejudice. We recognize there are grounds on which the Pennsylvania decisions could be distinguished but, in the absence of controlling authority to the contrary, we prefer to follow them. We do this the more readily since the general law of agency appears to be moving in this direction (compare Restatement of Agency § 120 (1933) with Restatement of Agency 2d § 120 & comment (1958); see also Wis. Stat. § 243.06 (1955)), and since there is much to suggest that the attorney who appeared for the decedent was in fact retained by and is representing someone very much alive.*

Order affirmed.

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* Appellees' brief states (p. 9), "It does not require much thought to realize that Waterson must have been the beneficiary of a liability insurance policy with an insurance company represented by John E. Morris." Appellant's reply brief makes no comment save to state that Morris and Waterson were "not on terms of social contact or acquaintance" (p. 5). The provisions of 39 N. J. Stat. 6-20 as to compulsory provisions in certain motor vehicle liability policies for direct action by a judgment creditor against an insurer, along with the fact that Waterson seems not to have had enough assets to warrant general administration in New Jersey, may afford a clue to this not very deep mystery.